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OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 18, 2008

In the Matter of Richard Cretarolo

Docket No. WET-2007-002
DEP File Nos. 28-1854
Gloucester

RECOMMENDED FINAL DECISION –
DISMISSAL FOR FAILURE TO PROSECUTE

The Petitioners, a ten-citizens group with an authorized representative of Stevan Goldin ("Mr. Goldin") of 14 Hodgkins Street in Gloucester, had filed on November 6, 2007 with the Office of Appeals and Dispute Resolution ("OADR") a request for an adjudicatory hearing with regard to a "Proposed subdivision of Richard Cretalaro (sic) at 2-14 Bass Ave., Gloucester, file no. 28-1854." After receiving a response to an Order to Show Cause, it was made clear that the claim involved challenges to a Superseding Order of Conditions ("SOC") for the development of the property.

Procedural History

On November 15, 2007, pursuant to the amended regulations at 310 CMR 10.05(7)(j) governing claims for adjudicatory hearings filed after October 31, 2007 of Reviewable Decisions under the Wetlands Protection Act, M.G.L. c. 131, §40 (the "Act"),[1] OADR issued a Scheduling Order directing all parties, including the Petitioners or their representative, to attend a Pre-Screening Conference on Tuesday, December 4, 2007 at 10 a.m. at the Northeast Regional Office of the Department of Environmental Protection (the "Department").

On November 29, 2007, an Order to Show Cause and For a More Definite Statement was issued to Petitioners directing them to file a copy of the Reviewable Decision and a more definite of statement of their claims. As explained in that Order, the Petitioners claims did not include a copy of the SOC, and their claims were difficult to understand as they did not reference the specifics of the project approved by the SOC.[2] Enclosed with that Order was a copy of the newly amended regulations governing claims for adjudicatory appeals of SOCs and other Reviewable Decisions under the Act, namely 310 CMR 10.05(7)(j). The deadline for responding to that Order was set for the same date and time as the Pre-Screening Conference: December 4, 2007 at 10 a.m. Neither Mr. Goldin nor any one of Petitioners attended this conference. Petitioners also failed to submit a timely response to the Order to Show Cause.

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[1] This case involves a Superseding Order of Conditions, for which a notice of claim for adjudicatory hearing was filed after October 31, 2007. This Superseding Order of Conditions is thus considered a Reviewable Decision under the Act, and is subject to the streamlined procedures and completion of hearing under the auspices of the OADR at the Department. The Department is mandated to issue final decisions in these matters within six months of the filing of the notice of claim. See, 310 CMR 10.05(7)(j).

[2] Even after receipt of the SOC, Petitioners' three claims in their appeal notice needed further clarification. The first claim alleged some concern about Riverfront delineation, but linked this to an expired "RDA." It is unclear what delineation Petitioners are objecting to. The second claim alleges concerns about overdevelopment in the area of the project based on a third party report; it is unclear how OADR would have jurisdiction under the Act to address this concern. The third and final claim complains that the project will not be able to obtain a sewer permit. This last claim is also one over which OADR would likely not have jurisdiction under the Act. Further explanation was needed to determine how to frame these issues to present questions within the jurisdiction of OADR for hearing.

Therefore, on December 5, 2007, I issued an Order to the Petitioners to Show Cause why the appeal should not be dismissed for failure to prosecute and failure to respond to the prior Order of Show Cause. A response was due by December 18, 2007. In the December 5th Order, I also established a schedule for further proceedings in this matter including the holding of a hearing on March 4, 2008. Later that same date, I received from the OADR Docket Clerk a copy of a filing by Mr. Goldin which appeared to be a late-filed response to the November 2007 Order to Show Cause with a copy of the SOC. The response did not include any additional explanation of Petitioners' claims. Instead, without citation of any legal authority, Mr. Goldin objected to the legality of the adjudicatory hearing requirement for attendance at a Pre-Screening Conference at OADR and requested an immediate transfer of the matter to the Division of Administrative Law Appeals ("DALA"). I treated this request as a motion for a transfer to DALA and denied it in a written decision issued on December 13, 2007. This decision included a copy of the October 31, 2007 Commissioner's Directive stating that claims for adjudicatory hearings under the new Wetlands Regulations appeal procedure would not be presumptively transferred to DALA.[3]

In an Amended Scheduling Order dated December 13, 2008, a copy of which is attached hereto, I scheduled a second Pre-Screening Conference date for January 8, 2008 at 1 p.m. at the Department's Northeast Regional Office. That Amended Scheduling Order informed Petitioners of their obligation to attend this conference to ensure that the issues were properly defined and the matter properly prepared for hearing. See, 310 CMR 10.05(7)(j)((7) and 310 CMR

[3] Prior to October 31, 2007, appeals of Reviewable Decisions under the Act were subject to a presumption in a 2004 Commissioner's Directive that they would be transferred to DALA ninety days after the filing of the notice of claim. Even under this presumption, however, the Commissioner had appointed and empowered Presiding Officers in the employ of the Department to schedule Pre-Screening Conferences, require attendance of parties and make every effort to attempt to narrow issues and resolve cases. While the purpose of these Pre-Screening Conferences was narrower, attendance was always mandatory. OADR has been able to resolve over one half of all adjudicatory claims through the use of the Pre-Screening Conference process and the other powers and authorities of Presiding Officers working for OADR.

1.01(5)(a) and 1.01(6)(j). I explained the importance of the Pre-Screening Conference to this process. I had already provided a copy of the regulations at 310 CMR 10.05(7)(j) setting forth the rules for this adjudicatory proceeding, including the mandatory requirement for a Pre-Screening Conference and the authority vested in Presiding Officers to mandate parties to attend such a conference.[4]

The Amended Scheduling Order also explained the sanctions for failure to attend the Pre-Screening Conference, including the sanction of dismissal. See, 310 CMR 1.01(10). The Order and the Decision on the Motion to Transfer to DALA also made clear that the requirements to attend conferences and the sanctions provided were also included in the general regulations that are applicable to adjudicatory proceedings both at OADR and at DALA on appeals of decisions by the Department. See, 310 CMR 1.01 et seq. In the Amended Scheduling Order, I offered Petitioners' representative, Mr. Goldin, the option of joining the Pre-Screening Conference by telephone, and I asked Mr. Goldin to contact the OADR Docket Clerk by December 20, 2007 to make arrangements for this telephone option.

[4] Holding a Pre-Screening Conference within 30 days of filing of the claim is mandated by the regulations. It was not completely clear to me that I had the authority to postpone the conference or offer an opportunity to hold a second conference more than thirty (30) days after the filing of the notice of claim. The language of the regulations is quite strict. Given that the Department must hold a hearing within 120 days and issue a final decision in these matters within 180 days of the filing of the notice of claim, any delay in holding the Pre-Screening Conference creates significant problems for keeping the adjudicatory proceeding in compliance with the regulatory timelines. However, the Petitioners are pro se, and they exhibited some confusion about what procedural rules governed this matter. Since the new rules were promulgated and made effective only a week before the filing of the appeal, I exercised my general authority and discretion to extend the time for holding the Pre-Screening Conference on the grounds that I had the power "to take any action authorized by M.G.L. c. 30A to conduct a just, efficient and speedy adjudicatory appeal." 310 CMR 1.01(5)(a). I decided that an additional opportunity was needed to ensure that Petitioners fully understood their rights and their obligations in this process, and the consequences should they persist in boycotting the process mandated by the regulations. I also decided that prejudice to the other parties to this matter would be minimized if I established a schedule that allowed them the same time granted by the regulations for preparation of their cases. This case should not be interpreted by parties in other cases as a precedent to allow all pro se litigants an opportunity to postpone a Pre-Screening Conference in order to further educate themselves on the adjudicatory procedure rules. There is now considerably more information about the enhanced Pre-Screening Conference process and the shortened appeals timelines that has been circulated among many environmental organizations. The information is readily accessible on the Department's website and through the Department's Service Centers. Persons appealing cases under the Act should now be able to educate themselves quickly on the obligations and deadlines imposed upon them under the amended regulations.

At the second Pre-Screening Conference on January 8, 2008 at 1 p.m., representatives appeared from the Department and for the Applicant. Prior to entering the conference meeting room, I had checked with our Chief Presiding Officer as to whether any calls from Petitioners had come in to the main office of OADR to seek to join the conference by telephone. No calls had come in either to OADR/Boston or the Northeast Regional Office. No submittal had come in to further clarify the Petitioners' issues and claims. No issues statements or other preparatory materials were submitted as required in the two Scheduling Orders. No one appeared or called on behalf of the Petitioners. Therefore, I adjourned the conference.

Dismissal for Failure to Prosecute is Warranted

Under 310 CMR 1.01(10), which is applicable to this adjudicatory proceeding, a Presiding Officer is authorized to impose sanctions upon parties which have conducted themselves in the same manner as have Petitioners. Specifically:

> (10) Sanctions. When a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation:
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> (a) taking designated facts or issues as established against the party being sanctioned;
> (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
> (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
> (d) striking pleadings in whole or in part;
> (e) dismissing the adjudicatory appeal as to some or all of the disputed issues;
> (f) dismissing the party being sanctioned from the appeal; and
> (g) issuing a final decision against the party being sanctioned.

In this case, the Petitioners have engaged in almost all of the conduct listed in the Sanction regulation: (1) Petitioners failed to file their claim documents to state complete and clear claims and to include a copy of the decision being challenged; (2) Petitioners failed to respond timely

and completely to the November and December 2007 Orders to Show Cause; (3) Petitioners failed to comply with two Scheduling Orders directing them to attend Pre-Screening Conferences; (4) Petitioners failed to submit issues statements and other needed preparatory materials and comply with time schedules in the Scheduling Orders; and (5) Petitioners' conduct and filings have made clear that they had an intention to delay the proceeding and avoid resolution of the issues they raised in their claim. Petitioners intentionally decided not to attend the Pre-Screening Conference; their failure to attend was not the result of error.

The ultimate sanction of dismissal is not one that I take lightly; however, I have much company among hearing officers who have had to dismiss other cases for failure to attend a prehearing conference. The prehearing conference serves the same purpose as does the Pre-Screening Conference under the amended regulations at 310 CMR 10.05(7)(j) in this proceeding. It is the only meeting prior to hearing and its purpose of establishing issues and the order of proceedings is central to the preparation of the matter for hearing. As stated by Magistrate Rooney while recommending dismissal of a notice of claim for adjudicatory hearing for failure to attend the prehearing conference in *Matter of Robert W. McKenney*, DALA Docket No. DEP-06-549, DEP Docket No. 2006-042, 2007 DALA LEXIS 18 (Recommended Final Decision, DALA, January 23, 2007):

> The reason an unexplained failure to attend a prehearing conference has often led to dismissal can be explained by the central role such conferences play in the adjudicatory process. It is typically the only occasion on which the parties to an appeal at the Division of Administrative Law Appeals must meet before the hearing. At this conference**,** the issues to be adjudicated are decided, the witnesses identified, and a hearing schedule established.

Petitioners' conduct in this matter is also analogous to conduct by the petitioner in *Matter of Hughes*, Docket No. 2000-014, Final Decision - Order of Dismissal, 7 DEPR 89

(July 11, 2000) in which the Petitioner failed to appear at a prehearing conference and had filed a vague notice of claim. Magistrate Cashin held that:

> Failure to attend a mandatory prehearing conference is a serious default, particularly by a petitioner." *Matter of McAdam and Chase*, Docket No. 91-072, Final Decision, 2 DEPR 42 (February 17, 1995). That is particularly true here, where I had ordered the Commission to file a more definite statement because its pleading gave insufficient notice to the Department and the applicant about the Commission's reasons for filing the appeal. A prehearing conference allows for the issues to be clarified and for a schedule to be developed for the hearing, including any necessary interim deadlines. The participation of the petitioner is critical to the accomplishment of these tasks in any appeal, but the petitioner's participation is particularly necessary when the initial pleading is vague and ambiguous. The Commission's serious default is compounded by its failure to file papers as required in advance of and at the conference.

See, *Matter of Hughes*, 7 DEPR at 90.[5] As in *Hughes*, I am handicapped by the failure of the Petitioners to participate in the conference and explain their issues in a way that allows me to arrange for orderly pre-hearing and hearing procedures. Without clear statements of issues, the other parties to this matter cannot prepare properly for a hearing. Unfortunately, Petitioners' deliberate failure to participate was also a missed opportunity for informal resolution of this matter. The Petitioners' conduct has obstructed resolution of this matter either through settlement or hearing. Therefore, for all the reasons set forth herein, I recommend that this matter be dismissed for lack of prosecution and obstruction.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore

[5] Petitioners' participation in the Pre-Screening and prehearing conferences is particularly important, but the Department has also dismissed applicants and other types of parties for failure to appear. See, e.g., *Matter of Kerrigan*, Docket No. 97-079, Final Decision, 5 DEPR 27 (February 25, 1998) (failure to attend prehearing conference or file a list of issues and witnesses resulted in vacation of superseding order of conditions and denial of wetlands permit).

not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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Laurel A. Mackay
Presiding Officer